No. 80-1140

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARK J. THOMAS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner's company violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain in good faith with the Union.

2. Whether petitioner's company was denied procedural due process.

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National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 624 F. 2d 192 (table). The decision and order of the Board (Pet. App. 5-93) are reported at 233 N.L.R.B. 1126.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1980, and a petition for rehearing was denied on September 15, 1980 (Pet. App. 94-95). The petition for a writ of certiorari was filed on December 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 7, 8(a)(1), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 157, 158(a)(1) and 158(a)(5), are set forth in the petition (Pet. 3-4). Another relevant provision of the Act, Section 8(d), 29 U.S.C. 158(d), provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. In May 1975, after winning a representation election, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504 ("the Union") was certified as the bargaining representative of the Betra Manufacturing Company's employees

(Pet. App. 32). Negotiations for a collective bargaining agreement began on June 9, 1975. From that date until January 19, 1976, the parties engaged in 13 negotiating sessions. Throughout the negotiations, petitioner Mark Thomas, the Company's owner, served as its principal spokesman, and Union Business Representative John DeCarli acted as the Union's chief negotiator (Pet. App. 33-34).

At the initial June 9 negotiating session Thomas told Union negotiator DeCarli that the Union would never get him to sign a collective bargaining agreement (Pet. App. 34). Thereafter, during the course of the 13 negotiating sessions, the Company and the Union made very limited progress toward reaching an agreement. Thomas refused to consider Union proposals on matters such as seniority and union security, and objected to such proposals as a "purpose of agreement" section and a provision allowing the Union use of the Company's bulletin boards. At the same time, Thomas insisted on the inclusion of broad "management rights" and "work rules" provisions—which would have given the Company unilateral control over matters affecting employees' terms and conditions of employment—as well as provisions that would have allowed the Company to determine the wages of employees within a broad range or lower all wages by 10% on the basis of business conditions or the competitiveness of the labor market. Thomas also pressed for acceptance of contract provisions requiring the posting of a $10,000 performance bond by the Union, and invalidating the contract in the event of any change in the Union's constitution, by-laws, or affiliation (Pet. App. 34-46).

At two negotiating sessions, Thomas presented Union negotiator DeCarli with a proposal for a complete contract, stating that the proposal had to be accepted in its entirety by a date certain, without any changes or discussion (Pet. App. 42-44). At the twelfth bargaining session, held on January 5, 1976, Thomas stated that he had told his employees that,

although they had voted the Union in, there would be no changes in employees' working conditions as a result of bargaining with the Union (Pet. App. 47). On January 19, 1976, when the next negotiating session was held, Thomas stated that he had no proposals to make, that he would never accept any Union proposals, and that future meetings would not be more productive and would only result in more stringent Company proposals (Pet. App. 47-48).

On February 4, 1976, the Union filed an unfair labor practice charge alleging that the Company had refused to bargain in good faith. A Board complaint based on the Union's charge was issued on March 31, 1976. Thereafter the Company and the Union entered into an informal settlement agreement, which was approved by the Board's Regional Director on April 27, 1976 (Pet. App. 48-49).[1] In order to effectuate compliance with the terms of the settlement agreement, the Board's Compliance Officer, by letter dated May 3, 1976, requested the parties to submit information on a regular basis concerning their continued negotiations. The Compliance Officer subsequently sent several additional letters to the Company, stating, *inter alia*, that the Company was required to submit written contract proposals, that it appeared that the Company was not bargaining in good faith but rather was obstructing the bargaining process, and that the settlement agreement would be withdrawn if the Company continued to engage in such conduct (Pet. App. 49-50).

Following the settlement agreement, negotiations resumed on May 25, 1976, and continued through the course

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[1]The settlement agreement provided, *inter alia*, that the Company would not refuse to bargain in good faith with the Union and insist on contract provisions involving nonmandatory bargaining subjects to the point of impasse, and that the Company would meet and bargain collectively in good faith with the Union concerning employees' terms and conditions of employment (Pet. App. 48-49).

of nine bargaining sessions—the final session being held on November 3, 1976. During these nine sessions substantial progress was made on reaching an agreement, even though Thomas displayed a reluctance to submit written contract proposals or to initial agreed-upon proposals during the first few post-settlement meetings (Pet. App. 50-63). At a bargaining session held on August 30, 1976, with a federal mediator present, Union negotiator DeCarli presented a contract proposal from which he had deleted sections on a wide range of topics, *e.g.*, area uniformity, training and shift premium; and general agreement was reached in some areas (Pet. App. 59). On October 12, 1976, at the next bargaining session, DeCarli agreed to approximately 24 items in the Company's most recent contract proposal and requested modifications in other sections of the Company's proposal (Pet. App. 60-61). The Company continued, however, to insist on contract provisions under which it retained broad discretion with respect to wages and the promulgation of work rules, as well as an extremely broad management rights clause and a section which required the Union to prove its continued majority status prior to negotiations for a new contract. In addition, Thomas continued to insist on contract language providing that the contract would be nullified if there were any change in the Company's ownership, or if a majority of employees stated in writing that they no longer desired to be represented by the Union. At the final negotiating session, held on November 3, 1976, DeCarli told Thomas that he was in general agreement with the Company's latest contract proposal except for these five provisions; Thomas indicated willingness to modify only one of them. A federal mediator present at the meeting told Thomas that another meeting would be scheduled if the Company would withdraw or sufficiently modify its position on these subjects; otherwise, the Federal Mediation and Conciliation Service (the "FMCS") would withdraw its services and the matter would be litigated before the Board.

The meeting concluded with the understanding that Thomas would contact the FMCS if he agreed to alter the Company's position concerning the matters remaining in dispute. Thomas never communicated any intent to withdraw or to modify the disputed provisions (Pet. App. 61-63, 81-88).

2. The Board, adopting the findings and conclusions of the Administrative Law Judge, found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union (Pet. App. 6, 63-67).[2] As the administrative law judge explained (Pet. App. 70-71):

> An examination of Respondent's contract proposals makes it abundantly clear that Respondent, from the outset, took and maintained a firm and unalterable stand on all major contract issues and even on most minor matters. Respondent exhibited by its intractable attitude and patently unacceptable contract proposals, underscored by statements during the course of bargaining to the effect that no collective-bargaining agreement would be entered into and that employees would not benefit from the advent of the Union, an intent to subvert the collective-bargaining process. Respondent's failure to make, for the most part, even arguably acceptable contract proposals cannot be attributed to lack of flexibility in the Union's position,

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[2]The Board upheld (Pet. App. 7 n.2) the Administrative Law Judge's denial of motions made by the Company for dismissal of the complaint on various constitutional grounds, concluding that they were "lacking in merit." The Company had moved for dismissal because, *inter alia*, the Board failed to grant the Company's request for appointed counsel, improperly denied its request for a trial by jury in federal court, deprived the Company of its right to a speedy trial, and exhibited administrative bias against the Company (Pet. App. 7 n.2, 29 n.1).

as Respondent maintains. Rather, the record evidence clearly shows that from the outset of negotiations the Union remained eager to discuss its proposals and frequently invited counterproposals from Respondent.

The Board ordered the Company to bargain in good faith with the Union upon its request. In addition, on the basis of its conclusion that the Company "displayed a total disregard for the rights of its employees to enjoy the fruits of their representation by good-faith negotiation of a contract," the Board also ordered the Company to grant the Union reasonable access to its bulletin boards; to make available to the Union a list of the names and addresses of all unit employees, to be kept current for a period of one year; and to post appropriate notices and mail copies to each of its employees (Pet. App. 10-14, 21a-26, 78-80).

3. The court of appeals upheld the Board's decision and enforced its order, concluding that substantial evidence supported the Board's finding that the Company refused to bargain in good faith with the Union (Pet. App. 1-4). The court also rejected the Company's contentions that enforcement of the Board's order should be denied because of the alleged bias of Board officials, procedural irregularities during the hearing before the Administrative Law Judge, and the desire of the Company's employees for a decertification election (Pet. App. 2-4).

ARGUMENT

1. Petitioner contends (Pet. 6, 17-18) that the Company bargained in good faith and that its defense to the unfair labor practice charges was erroneously rejected by the court of appeals. This contention is without merit. Sections 8(a)(5) and 8(d) of the National Labor Relations Act require an employer to bargain in "good faith." The question whether an employer has satisfied this obligation involves largely a factual determination based on an appraisal of the total conduct of the parties. See, *e.g.*, *NLRB* v.

Insurance Agents' Int'l Union, 361 U.S. 477, 498-499 (1960); NLRB v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952); *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring and dissenting). Here the court of appeals affirmed the Board's finding that the Company's overall conduct during the course of protracted contract negotiations amounted to a failure to bargain in good faith with the Union. Further review of this essentially factual question is not warranted. *NLRB* v. *American National Insurance Co., supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner makes various conclusory allegations (Pet. 1-17, 22-24) with respect to alleged instances of deceit, bias, and procedural irregularities in the processing of charges filed against the Company, the monitoring of the settlement agreement, and the subsequent adjudication of the case before the Administrative Law Judge and the Board after the Company breached the agreement. As petitioner concedes (Pet. 16), however, he "pointed out" in his brief in the court of appeals all of the alleged "inequities and harrassments [*sic*]." The court of appeals permitted petitioner to supplement the record with documents that he contended supported his allegations (Pet. 16), "carefully examined" petitioner's contentions, and found them to be "without merit" (Pet. App. 4). That determination is correct, but in any event these fact-bound issues do not warrant further review by this Court. Petitioner's contentions respecting the litigation of the Board's enforcement petition in the court of appeals—*e.g.*, his assertions that the Board's brief construed cited cases in the light most favorable to its positions (Pet. 15, 17-18) and that the brief described petitioner as "disingenuous" even though the Board's attorney had not met him (Pet. 18)—similarly present no question appropriate for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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